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SERVICE DATE - NOVEMBER 16, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34094

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY—ACQUISITION EXEMPTION—UNION PACIFIC RAILROAD COMPANY

Decided: November 13, 2001

On September 7, 2001, the Santa Clara Valley Transportation Authority (VTA), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire approximately 5.8 route miles of a Union Pacific Railroad Company (UP) railroad right-of-way and certain related improvements located in Santa Clara County, CA (line). Notice of the exemption was served by the Board and published in the Federal Register on October 4, 2001 (66 FR 50708). On September 7, 2001, VTA also filed a motion to dismiss its notice of exemption, however, on the grounds that this acquisition does not require authorization from the Board and that VTA will not become a common carrier subject to our jurisdiction. The motion to dismiss will be granted and the proceeding discontinued.

BACKGROUND

In its motion to dismiss, VTA stated that it will enter into three agreements with UP—a Purchase and Sale Agreement, a Construction Agreement, and an Operation and Maintenance Agreement—to acquire a portion of UP's right-of-way to construct and operate an extension to VTA's light rail transit system. Pursuant to the Purchase and Sale Agreement, VTA will acquire all of UP's right, title and interest in the right-of-way, and certain rail improvements located on the right-of-way, between the south side of San Carlos Avenue at approximately UP milepost 0.08, in San Jose, and the northerly boundary of the State Route 85 overpass at approximately UP milepost 5.77, in Vasona. VTA also will be acquiring UP's trackage, but not the underlying real estate constituting the right-of-way, between the point of switch off the UP Peninsula Corridor Main Line, at approximately UP milepost 0.00, and approximately UP milepost 0.08, on the Vasona Branch. The Purchase and Sale Agreement provides that UP will retain a perpetual, exclusive railroad easement for the continuation of freight rail service, by itself or through its designee, on the line. As set forth in the Purchase and Sale Agreement, VTA will be prohibited from using all or any portion of the line for rail freight operations.

VTA states that UP's freight rail track and VTA's light rail track will be completely separate from each other within the same right-of-way. Pursuant to the Construction Agreement, a portion of UP's freight track will be relocated and reconstructed on the southerly portion of the

right-of-way and UP will continue to operate freight service over the newly-constructed line.¹ VTA will construct and operate a new light rail track extension on the northerly portion of the right-of-way. The Construction Agreement further provides that no disruption or cessation of UP's freight service operations on the line shall be permitted or required during VTA's construction of its light rail transit system.² In addition, VTA's track and facility improvements, following the initial construction of its light rail transit system extension, will be subject to UP's review and approval.

The terms of the Operating and Maintenance Agreement provide that UP will retain the right to develop new freight business on both sides of the right-of-way. UP will have the right to construct, maintain, replace, remove, use and operate both existing and new tracks on the line in order to fulfill its common carrier obligation to shippers and receivers of freight. Should UP desire to construct any new industry tracks on the line, including any that would cross VTA's light rail track, UP will obtain VTA's prior written consent, which shall not be unreasonably withheld, conditioned or delayed.

The Operating and Maintenance Agreement holds VTA responsible for the maintenance of the track and facilities (including the track over which UP provides freight service) on the Eastern Segment. UP will be responsible for maintaining the track and facilities on the Western Segment until such time as VTA decides to construct light rail improvements on that segment as well. When VTA completes the improvements on the Western Segment and commences light rail operations, it will assume maintenance responsibility for that segment. Both VTA and UP will be obligated to maintain the track and facilities on which UP operates freight service to at least UP's current maintenance standards. If either VTA or UP fails to maintain the freight track and facilities, the other will have the right to perform such maintenance and will be entitled to reimbursement of costs and expenses from the non-performing party. VTA will not perform any maintenance, except for emergency maintenance, to any track or facility on the line in such a manner as to delay or interfere with UP's freight operations.

¹ Citing Sacramento Regional Transit District–Petition for Declaratory Order Regarding Carrier Status, STB Finance Docket No. 33796 (STB served July 5, 2000) (Sacramento), VTA maintains that no Board approval is required for UP's relocation and construction of its freight track. In Sacramento, the Board found that the carrier's relocation of its tracks within its right-of-way would not affect service to shippers, the carrier's territory or traffic, competition, or the carrier's revenues or operating expenses.

² The Construction Agreement indicates that VTA intends to provide light rail passenger service on and over the Vasona Branch in phases. The first phase will extend from approximately San Carlos Street westerly to approximately South Winchester Blvd. (Eastern Segment). The second phase will extend over the remainder of the Vasona Branch (Western Segment) at a later time that has yet to be determined.

UP will retain the exclusive authority to manage, direct and control all UP freight train operations on the line, provided, however, that it coordinates its operations with VTA's light rail operations and maintenance supervisors with respect to at-grade crossings.³ UP will have the exclusive use of the track on the southerly portion of the line, and VTA will not have any right to use this track without the prior written approval of UP.

According to VTA, the various agreements to be entered into between VTA and UP demonstrate that VTA will not hold itself out to provide common carrier rail service over the line and that the transaction does not require Board authorization under Maine, DOT – Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

DISCUSSION AND CONCLUSIONS

The two issues here are (1) whether the proposed acquisition by VTA (a noncarrier) of rail assets of UP (a rail carrier) requires regulatory authorization, and (2) whether VTA will become a regulated common carrier. It is well established that when a noncarrier, including a state, acquires a freight rail line that has not been abandoned, it must seek our approval under section 10901.⁴ See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Our authorization is not required, however, where the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

“[T]he fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier” See Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973). In the typical sale of a non-abandoned rail line, the new owner is presumed to succeed the former owner in assuming the obligation to ensure that freight rail service continues over the line. Here, however, VTA will not hold itself out as a common carrier performing freight rail service, and no common carrier rights or obligations are being transferred. VTA will acquire the railroad right-of-way and certain related improvements from UP for the sole purpose of constructing and operating an extension to its light rail transit system. UP will retain a permanent binding easement to conduct the freight railroad operations on the line. Moreover, adequate protections, by way of the proposed agreements, have been built

³ VTA and UP currently anticipate that, following the relocation of UP's freight track, there will be one location where VTA's light rail system will be crossed at grade by UP's industry track.

⁴ Where a state obtains property approved for abandonment, that transaction is exempt under 49 CFR 1150.22. Where the line has already been abandoned pursuant to our authorization, we have no further jurisdiction over the disposition of the property.

into the transaction to prevent interference with UP's freight operations and to ensure that UP has the right and necessary access to maintain, operate, and renew the line.⁵

In sum, on the basis of representations made by VTA that it will not hold itself out as a common carrier of freight, as well as our review of the proposed agreements submitted into the record, which demonstrate that this transaction will not impair UP's ability to fulfill its common carrier obligation, we find that our authorization is not required for the transfer of the rail assets in this case. Therefore, we will dismiss VTA's notice of exemption and discontinue this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. VTA's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is discontinued.
3. This decision is effective December 16, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

⁵ UP's contemplated relocation and construction of its freight line within its right-of-way does not require Board authorization under 49 U.S.C. 10901 as long as the transaction meets the criteria established in Sacramento.